No. ~~12124~~

In The United States Court of Appeals

For the Ninth Circuit

DALE MENEFEE, *Appellant,*

—VS.—

W. R. CHAMBERLIN CO., a corporation, *Appellee.*

FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

J. DUANE VANCE,
BASSETT & GEISNESS,
Proctors for Appellant.
811 New World Life Building,
Seattle 4, Washington.

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FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

The appellant, a seaman, filed a libel in personam against appellee, his employer, in the United States District Court for the Western District of Washington (Ap. 2), stating two causes of action: the first for compensatory damages for personal injuries alleged to be due to negligence of the appellee, and the second for wages, maintenance and cure. The appellee answered (Ap. 7).

The cause came regularly on for trial before the Honorable John C. Bowen, District Court Judge of the United States District Court for the Western District of Washington, Northern Division, and the Court entered a decree dismissing both causes of action. Thereafter the matter was appealed to this court by the libelant and pursuant to said appeal this court af-

firmed the trial court as to the second cause of action and reversed the holding of the trial court as to the first cause of action for compensatory damages for injuries suffered as the result of the negligence of the employer and remanded the case to the District Court for the fixing of appellant's damages (*Menefee v. W. R. Chamberlain Co.* 1949 A.M.C. 1388). Thereafter, the matter was presented to the District Court who after hearing the argument of counsel entered findings of fact and conclusions of law (Ap. 10), a decree (Ap. 13), and a written decision (Ap. 17), fixing the appellant's damages in the sum of $750.00. Appellant thereafter duly prosecuted his appeal to this court.

JURISDICTION OF THE DISTRICT COURT

The jurisdiction of the District Court is granted by the provisions of Title 28 U.S.C.A. Section 41 (this action having been commenced prior to the 1948 amendment of the Judicial Code), which vests jurisdiction of all admiralty causes in the Federal District Court. Although the statutory provisions of the Jones Act, 46 U.S.C.A. 688, are applicable these may be enforced in an admiralty proceeding, *Baltimore SS. Co. v. Phillips*, 274 U.S. 316, 71 L.ed. 1069; *Panama Ry. v. Johnson*, 26 U.S. 375, 68 L.ed. 748; *Rogosich v. Union Dry Dock & Repair Co.*, 67 F.(2d) 377.

JURISDICTION OF THE COURT OF APPEALS

The jurisdiction of this Court is granted by the provisions of Title 28 U.S.C.A. 1291, which gives to the Courts of Appeal the jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE

All issues in this case have been resolved except the damages suffered by appellant as the result of the negligence of his employer; therefore, this statement refers only to that issue.

The appellant was injured or or about January 23, 1947 while employed as an ordinary seaman aboard the SS. ROBERT PARROTT on a voyage from Puget Sound to the Orient. The vessel having encountered heavy weather, the master ordered the mate to secure a mooring hawser which had been negligently and carelessly left lashed to the bulwark on the stern of the vessel (*Menefee v. W. R. Chamberlin Co.* 1949 A.M.C. 1388). The appellant was a member of the group selected for this task. The crew made their way aft into the gun crew's quarters and waited for an opportunity to go out and bring in the hawser (Tr. 16). After waiting awhile, the first mate, the boatswain and the appellant were the first ones out of the gun crew's quarters (Tr. 17). A huge wave came over, catching the men. The appellant testified concerning the events that followed thusly (Tr. 17):

> "Q. How long were you on deck before the wave came over?
>
> A. We just got out and—I don't suppose over 7 or 8 seconds. We just got out there when a wave came right over and knocked us all down.
>
> Q. When the wave knocked you down, what did you strike?
>
> A. I had hold of one of the lines tied to the mooring line. The wave knocked me down on the deck on my stomach, and somehow I turned

around and I flew up,—when the wave went back out again I hit the underpart of the gun tub. Then I came down on the deck again on my back. There were three different objects that came down on top of me. What they were I don't know."

The appellant laid on some old ropes in the gun crew's quarters, his leg was black and blue and there were two welts across his back; he was practically unconscious (Tr. 18). At about 4:30 P.M. (approximately three hours later), the crew managed to make it back to the midship house (Tr. 18), the appellant being carried by two other men (Tr. 18, 74, 84, 92).

Thereafter appellant stayed in his bunk until the ship arrived at Yokohama approximately a week later (Tr. 19) where he saw an Army doctor who told him he had several broken arteries in his leg and that his leg was bleeding inside and this blood evidently caused poison to his system which would have to slosh away. This doctor told him there was nothing much he could do for him (Tr. 20). Thereafter, as the vessel went from Yokohama to Saipan appellant still stayed in bed (Tr. 21). His leg was black and blue and his back and hip hurt him (Tr. 21). His left leg was swelled up half again as large as his right leg (Tr. 21), and was black and blue from his ankle to his knee. At Saipan his leg was bandaged by an Army doctor's orderly (Tr. 22). The ship was at Saipan approximately two weeks when it left for Hong Kong (Tr. 23). Half way to Hong Kong appellant was ordered to stand his wheel watches (Tr. 24); (we assume that the court will take judicial notice that the seaman's duty of standing wheel watch consists of

three tours of duty in a 24-hour period of an hour and 20 minutes each of standing or sitting on a stool at the wheel and steering according to the directions of an officer in attendance). He did no other work as did the other seamen (Tr. 24).

He arrived back in the United States on August 3, 1947 at which time his back bothered him and when he walked as much as 10 or 12 blocks his leg would swell and become discolored (Tr. 25). In October, 1947, he tried working on a railroad thirty miles outside Seattle and worked about 6 days but could not continue that work because his leg would swell and become discolored (Tr. 25, 26, 27). In July of 1948 he went to Livingston, Montana (Tr. 27) where his brother lives (Tr. 26) and attempted to work in the hay fields running a tractor, mowing and stacking, but he couldn't do that type of work because of his back (Tr. 27). At the time of trial in August, 1948 he felt he was capable of doing light work, his leg seemed fairly well but his back continued to bother him (Tr. 28).

In connection with this recited history it is important to note that the appellant was reared an orphan, acquired only a fourth grade education (Tr. 5, 6) and has never done anything but manual labor all of his life (Tr. 28). He has never before suffered any injury or major illness; has never been off work from any disability (Tr 27, 28).

The employer elicited from appellant on cross-examination that he has been affected with nervousness all of his life (Tr. 67) and it is clear from a

study of the testimony that the shock to his nervous system because of this experience and his injuries has been considerable.

The chief mate who testified on behalf of the respondent-appellee in large measure corroborated the testimony of the appellant as to the extent of his injury and the treatment he received (Tr. 107, 108), testifying that Menefee did no work at all for approximately a month after his injury and thereafter he kept him on "light work" as long as he was on the vessel, which was until July 2, 1947 (Tr. 108-109). The purser testified that Menefee did perform his full duties sometime after leaving Saipan (Tr. 149). The purser diagnosed his condition as a "very severe bruised leg" (Tr. 143) and testified that Menefee was on crutches when the vessel arrived at Saipan stating "when we first arrived (meaning at Saipan) he was only able to hop around on crutches—it wasn't advisable for him to walk more than was absolutely necessary."

The testimony of the chief mate and purser was given by deposition.

The appellant's monthly base pay is shown in Libelant's Exhibit I, to be approximately $159.00 per month, and a seaman, of course, receives board and lodging of the approximate value of $100.00 a month.

At the conclusion of counsel's argument the court filed a written decision (Tr. 17) which reads as follows:

"THE COURT: When I first read that state-

ment on page 2 of the advance sheet of the Appellate Court's decision, as follows:

"'* * * This is not 1849, when captains and courts felt that sailors must face any exposure and keelhauling and thumb tricing enforced obedience,'

"I was very much surprised, because the evidence in the case at the former trial had not convinced me that the injury of the libelant in this case was anything more than a flesh injury. There were no bone injuries nor injuries connected with bones or muscles likely to be seriously disabling for any considerable length of time. However that may be, the majority members of the Appellate Court in their opinion have seen fit to use the above-quoted words ordinarily in bygone days used to describe some colorful or sensational saga of the sea.

"This Court has reconsidered the evidence and the arguments of counsel on the evidence and concerning the inflated value of the dollar *and the Appellate Court's view of the case.*

"Considering the evidence and argument as to lost wages, his pain and suffering, the length of time following the accident during which the libelant was not regularly doing his work on board the ship, the nature of the injury and the evidence as to its interference with libelant's labors, his work record as disclosed by the evidence, and considering everything proper to consider, the Court finds, concludes and decides that the sum of seven hundred fifty dollars ($750.00) would be a just and reasonable compensatory sum to be allowed libelant for all of his damages, special and general, sustained by him as a proximate result of the accident.

"*Endorsed*: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 18, 1949.

"MILLARD P. THOMAS, Clerk.

"By KOERNER, Deputy."

(Emphasis supplied)

SPECIFICATION OF ERRORS

The appellant hereby assigns error in the decree of the District Court in the above entitled action, dated August 23, 1949, as follows:

(1) The Court erred in finding and concluding that the appellant had been damaged only in the sum of $750.00.

(2) The Court erred in failing to find and conclude that the appellant had been damaged in a sum greatly in excess of $750.00.

THE APPELLANT WAS ENTITLED TO AN AWARD GREATLY IN EXCESS OF THE SUM FIXED BY THE TRIAL COURT.

This argument is addressed to both assignments of error, which are as follows:

(1) The Court erred in finding and concluding that the appellant had been damaged only in the sum of $750.00.

(2) The Court erred in failing to find and conclude that the appellant had been damaged in a sum greatly in excess of $750.00.

In the first instance it is undisputed that the appellant's injuries arose from an extremely violent occur-

rence. While holding onto a line he was knocked down on the deck and up against the gun tub and back down on the deck and three different objects fell on top of him (Tr. 17). He complained immediately of his injuries and the other members of the crew solicitously looked after him and had him rest on a pile of old ropes in the gun crew's quarters until he could safely be moved to his quarters. It is also undisputed that he required carrying to his quarters.

It is also undisputed that except for going to meals, etc., he was required to stay in his bed for a month and that thereafter for some time he was around on crutches.

These undisputed facts refute the statement of the trial court that the injury in this case was not "seriously disabling for any considerable length of time" (Ap. 17). Of course, bone injuries are more sensational because they are susceptible to the proof of the X-ray. Likewise, muscular and tendonous injuries can be examined and repaired by surgery. Medical science can yet do nothing toward remedying injuries to the smaller or capillary blood vessels and the smaller nerve branches. These nature must correct and repair. Since we can not see this injury either by pictures or by surgery we can judge its severity only by external manifestations. It seems apparent even to a casual observation that a bruise which requires one month of being bedfast should be classed as an injury that is "seriously disabling."

The chief mate corroborated the appellant's testimony that he thereafter was on light duty for six months, the appellant testifying that by light duty he meant that he only stood his wheel watch, and did none of the other work which is customarily done about the ship. Although this was in some measure contradicted by the purser since both the purser and the chief mate testified by deposition we submit that the greater weight should be given to the chief mate's testimony inasmuch as he is the officer directly in charge of the men and in a better position to know exactly what duties they are performing. We have at least, then, corroborated testimony that the appellant was still partially disabled at the time he left the vessel, more than five months after the date of his injury.

The evidence of appellant's condition thereafter is contained in his own testimony and was to the effect that in October, 1947, he had tried to work on the railroad and was unable to do so because after long standing his leg would swell and that just prior to the trial, sometime in July of 1948, he had tried to do hard manual labor on the farm and was unable to do so because of his back and leg. He further testified that at the time of trial his leg felt pretty good and he felt he could at least do light work.

Although the appellee took and used appellant's oral discovery deposition and had full opportunity for complete medical examination to disprove these statements of appellant, if false, no evidence was produced by the appellee in disproof of these statements.

Other adjudications are, of course, of very little assistance in such cases since the amount to be award-

ed depends upon so many different factors. In this case it is clear that the injury and suffering of the appellant was greatly increased by his nervous instability, his lack of education and understanding and his lack of experience in any gainful employment other than hard manual labor. Thus, in *Walsh's Case*, 63 Fed. Supp. 421, 1945 A.M.C. 747, 152 F.2d 46, 1945 A.M.C. 1513, the trial court awarded the libelant $13,000.00, of which $1,300.00 was for pain and suffering. The evidence showed that part of the injury was due to congenital weakness in the injured member. In raising the award for pain and suffering to $4000.00 the Court of Appeals said:

> "Probably the damaged condition of Walsh's spine was in part congenital; but there can be no doubt that, however little the fall might have injured the spine of a normal man, it injured Walsh enough to subject him to a long and severe ordeal, and, in accordance with the general doctrine, the respondent must completely indemnify him, regardless of his idiosyncracy. The *Jefferson Myers*, 45 F.2d 162; *Pieczonka v. Coleman Company*, 89 F.2d 353, 357; *Oliver v. Yellow Cab Co.*, 98 F.2d 192."

By way of further rather startling contrast to the award in this case are three recent maritime awards by district judges in other districts. In *Forbes v. U.S.*, 1948 A.M.C. 1300, a truck ran over the libelant's toe. He was totally incapacitated for four months and there was evidence of some permanent disability in the toe. The libelant was awarded $10,000.00.

In *Mason v. U.S.*, 1948 A.M.C. 1052, the libelant's back was injured but there was no permanent injury.

He was awarded his wages, his medical bills and $6250.00 for pain and suffering.

In *Portel v. U.S.*, 1949 A.M.C. 487, the plaintiff suffered first, second and third degree burns. He spent 23 days in the hospital and was thereafter in bed at home for three weeks. He had normal recovery except for some scars on his body but there were none on his face. He was awarded $650.00 for lost wages and $15,000.00 for pain and suffering.

If the appellant's testimony be given any credence at all and it is important to note that he has been corroborated in every other important aspect of the case, he had lost in excess of $3000.00 past wages and subsistence at the time of the trial in August, 1948. The trial court made no finding with reference to this claimed loss. The trial court nowhere in the findings of fact, conclusions of law, decree, or decision commented either favorably or unfavorably on the testimony of the appellant, but did, in his written decision which was filed, comment upon the Court of Appeal's view of the case. Examine the first sentence of the trial court's decision wherein it is said:

> "When I first read that statement on page 2 of the advance sheet of the Appellate Court's decision, as follows:
>
> "'* * * This is not 1849, when captains and courts felt that sailors must face any exposure and keelhauling and thumb tricing enforced obedience.'
>
> "I was very much surprised, because the evidence in the case at the former trial had not convinced me that the injury of the libelant in

this case was anything more than a flesh injury." The two portions of the sentence are in themselves inconsistent because the quoted portion of this court's opinion makes no reference at all to the severity of appellant's injuries. That part following the word "because," therefore, has no relation to the first part.

In the next paragraph the court states that in reconsideration of the case he has considered "the Appellate Court's view of the case." This court did not in any manner or way consider or treat of the question of the injuries or the damages of the appellant in its previous decision. It remanded the case to the trial court for his free and untrammeled opinion, unguided by any hint or suggestion in the Court of Appeal's decision as to what should be done in this regard. In what manner did the trial court then consider "the Appellate Court's view of the case" in assessing the damages? If the trial court was influenced in any way by this court's previous decision in assessing the appellant's damages he committed an error of law in applying the standard by which the damages are measured. To bring that point into clearer focus, it is elementary to say that the trial court should apply the same test in awarding damages as he would instruct a jury to apply. If these damages had been fixed by a jury, an instruction by the court to that jury to the effect that they were to consider the previous decision of the Court of Appeals in this case in fixing the damages would be clearly in error. Since the trial court has determined the damages with reference to an immaterial factor the appellant respectfully requests that this court

disregard the trial court's conclusion as to damages and assess the damages in such amount as based upon the evidence in the case would fully and fairly compensate the appellant for his lost wages, for pain and suffering and for future partial disability, if any.

Appellant believes that the following language of this court in the former decision in this case is perfectly appropriate to this situation:

> "As stated in *Langes v. Green*, 282 U.S. 531, 537, citing *Watts, Watts* N *Co. v. Unione Austriaca*, 248 U.S. 9, 21, 'This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice *may at this time* require;' and 'the rule is more insistent, because, in admiralty, cases are tried *de novo* on appeal.' *Rice Growers v. Roderinktiebolaget Frode*, 171 F.2d 662, 663 (Cir. 9). Cf. *Petterson Lighterage, etc. Cd. v. New York Central R. Co.*, 126 F.2d 992 (Cir. 2)."

CONCLUSION

The appellant respectfully requests that this court modify the trial court's award by increasing the amount to a sum reasonably sufficient to compensate the libelant for the damages he sustained.

Respectfully submitted,

J. DUANE VANCE,
BASSETT & GEISNESS,
Proctors for Appellant.